UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.	)	
and	)	**Case 12-CA-25764**
MICHAEL CUDA, an Individual	)	

RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS

Respondent D.R. Horton, Inc. ("Company" or "D.R. Horton") submits this brief answering Counsel for the Acting General Counsel's ("General Counsel") exceptions filed on March 14, 2011.[1] The General Counsel took exception to the Administrative Law Judge's ("ALJ") findings asserting that the ALJ erred in failing to conclude that the Company's Mutual Arbitration Agreement ("Arbitration Agreement") violated Section 8(a)(1) of the Act based on the General Counsel's belief that: (1) "[t]he concerted filing of a class action lawsuit or arbitral claim is protected activity;" (2) "[a] mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action violates...the Act;" and (3) "[t]he [Arbitration Agreement] in this case is overly broad because a reasonable employee could read it as prohibiting him or her from joining with other employees in an attempt to pursue a class action lawsuit and as prohibiting him or her from challenging the [Arbitration] Agreement." The General Counsel also asserts that, in addition to

[1] Referral to the General Counsel's March 14, 2011 brief encompasses his March 29, 2011 amended filing correcting the table of cases from the March 14, 2011 brief.

the remedies recommended by the ALJ, the Company should be required to "take [additional] steps to remedy the unfair labor practices."

The Company asserts that the General Counsel's exceptions are unsupported by the record[2] and controlling legal authorities and that the ALJ's decision with regard to the General Counsel's excepted issues should stand.[3]

FACTS

The Arbitration Agreement at issue is entitled "Mutual Arbitration Agreement" (Joint Exh. 2). The Company has used the Arbitration Agreement since 2006 and requires its employees to sign the Arbitration Agreement as a condition of employment. (Joint Exh. 1 at para. 2). When the Company first presented the Arbitration Agreement to employees, not one refused to sign it. (Tr. at p. 29).

By its terms, the Arbitration Agreement binds both the employee and Company and serves the interests of both by "avoid[ing] the burdens and delays associated with **court** actions." (Joint Exh. 2 at preamble (emphasis added)). In signing the Arbitration Agreement, "the Company and Employee voluntarily waive all rights to trial **in court** before a judge or jury on all claims between them" in favor of submitting such claims to arbitration. (*Id.* at para. 1 (emphasis added)).

The selection of the arbitrator is to be by mutual agreement, and administrative details are to be handled according to the National Rules for the Resolution of Employment Disputes of the

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[2] Transcript references to the record in the ULP hearing on November 8, 2010 shall be parenthetically designated as "Tr.", followed by the applicable page number(s).

[3] However, the Company does not agree that any violation of the Act exists and therefore affirmatively asserts that no remedy imposing obligations on the Company would be proper for any aspect of the ALJ's decision. Additionally, the Company reasserts in their entirety its exceptions and brief in support submitted to the Board on March 14, 2011.

American Arbitration Association ("AAA"), a neutral third party. (*Id.* at para. 4). The costs "unique to arbitration" are borne by the Company except that in cases initiated by an employee, the employee must contribute an amount equal to "the filing fee to initiate the claim in the court of general jurisdiction in the state in which Employee is or was last employed by the Company." (Joint Exh. 2 at para. 7).

The Arbitration Agreement states that it applies to an employee's "individual claims." (Joint Exh. 1, para. 6). Specifically, paragraph 6 of the Arbitration Agreement (Joint Exh. 2) states:

> The parties intend that this Agreement will operate to allow them to resolve any disputes between them as quickly as possible. Thus, the arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

Certain matters are expressly excluded from the Arbitration Agreement, including claims "for declaratory or injunctive relief" relating to a confidentiality or non-competition matters or a "similar obligation." (*Id.* at para. 2).

The Arbitration Agreement does not even mention the NLRB. Furthermore, Company managers are instructed to tell employees who express uncertainty about the scope of the Arbitration Agreement that they would "still be able to go to the EEOC or similar agency with a complaint" and "the arbitration policy applies to any relief you may seek through the courts." (Employer Exh. 1 at p. 1).

Consistent with this instruction from the Company, when Cuda filed the unfair labor practice charge herein, the Company did **not** take the position that the charge was subject to the Arbitration Agreement and not properly before the Board, nor has the Company taken any

adverse action against Cuda or other employees who filed charges. Similarly, undisputed testimony proves that Company employees have regularly sought recourse from other federal and state administrative agencies to resolve employment issues since the Company began using the Arbitration Agreement in 2006 and, consistent with the Company's original intent under the Arbitration Agreement as well as the manner in which the Company has implemented the Arbitration Agreement, the Company has taken no adverse action against such employees or so much as questioned employees' right to submit complaints to administrative agencies. (Tr. at pp. 36-37).

Cuda and other Company employees have instituted individual claims against the Company for unpaid overtime under federal wage and hour laws and invoked arbitration under the Arbitration Agreement, but they have sought to litigate those arbitrations as a class or collective action in disregard of paragraph 6. (Joint Exh. 3-11). The Company has taken the position before the AAA that the Company is not required to litigate a class or collective action and objects to doing so, citing the language of paragraph 6. (*Id.*). Although this is the Company's litigation position, there is no evidence whatsoever that the Company has taken any adverse employment action against any employee who has sought to litigate a class or collective action. Rather, the Company simply has resisted having to arbitrate a class or collective action while expressing its readiness to proceed on an individual basis as the Mutual Arbitration Agreement provides.[4] In short, the Company's litigation position has had no impact on any employee's employment.

[4]The Company's communication of its legal position and intent to enforce the agreement is reflected in correspondence between Cuda's counsel and counsel for the Company. (GC Exh. 3-11).

ARGUMENT

A. The Arbitration Agreement's Provision Restricting the Arbitrator's Ability to Entertain Class or Collective Action Claims is not a Violation of the Act.

At the hearing and in the General Counsel's exceptions to the ALJ's decision in this matter, Counsel for the General Counsel takes the position that the provision in the Arbitration Agreement quoted in paragraph 4(a) of the Complaint, which provides that "the arbitrator will not have the authority to consolidate claims of other employees into a proceeding originally filed by either the Company or the Employee" and that the arbitrator "may hear only Employee's **individual claims** and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding," constitutes a violation of Section 8(a)(1) of the Act. (Tr. at p. 16). The General Counsel, as argued at the hearing and in his exceptions to the ALJ's findings in this matter, believes the Company violated the Act by "refusing to allow the employees' claims to be heard on a collective basis" and by "us[ing] the mutual arbitration agreement as a prohibition against such claims" in arguments to the AAA. (*Id*).

This claim is wholly without merit and the General Counsel simply tries to misconstrue clearly drafted contractual language in the Arbitration Agreement to say something that it simply does not say. Furthermore, the claim flies in the face of the published position of the Office of the Board's former General Counsel himself; is contrary to the spirit of the Act and Board decisions favoring the resolution of disputes through arbitration; and is contrary to Supreme Court precedent and decisions from federal circuit courts throughout the country that have found such agreements lawful.

1. The General Counsel's position contradicts Supreme Court precedent and decisions of the federal courts.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), the United States Supreme Court held that a party's inability to pursue class or collective relief in arbitration **does not** interfere with that party's ability to vindicate his statutory rights. In *Gilmer*, the plaintiff argued, like Cuda, that he should not be compelled to arbitrate his claims under the Age Discrimination in Employment Act ("ADEA") because he would be unable to pursue class or collective treatment in arbitration. *Gilmer*, 500 U.S. at 26.[5] The Supreme Court rejected this argument. In doing so, the Supreme Court made clear that a party **can** fully vindicate his/her statutory rights through individual arbitration and "does not forgo the substantive rights afforded by the statute" because the party merely submits his/her claims to resolution in an arbitral, rather than a judicial, forum. *Id.*

Subsequent to the Supreme Court's decision in *Gilmer*, **every** Circuit Court of Appeals that has addressed the issue has ruled the same. In *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004), the Fifth Circuit expressly rejected the plaintiffs' argument that their "inability to proceed collectively [under the FLSA in arbitration] deprives them of substantive rights under the FLSA." *Id.* As the Fifth Circuit held, so long as a plaintiff can pursue the substantive statutory rights through individual arbitration, a plaintiff's inability to proceed collectively or on behalf of a class is legally irrelevant:

> We reject the Carter Appellants' claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA. The Supreme Court rejected similar arguments concerning the ADEA in *Gilmer*, despite the fact that the ADEA, like the FLSA, explicitly provides for class action suits.

Id.

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[5]The ADEA expressly adopts the provision for collective actions from the FLSA. 29 U.S.C. § 626(b); *Carter*, 362 F.3d at 298; *see* 29 U.S.C. § 216(b).

Likewise, in *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002), the Fourth Circuit Court of Appeals held there was "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute." The court held the plaintiffs' "inability to bring a class action ... cannot by itself suffice to defeat the strong congressional preference for an arbitral forum." *Id.*

The Ninth Circuit Court of Appeals also has rejected the argument that a prohibition against collective actions in an arbitration agreement renders the arbitration agreement unenforceable or unlawfully inhibits the exercise of employees' statutory rights:

> Appellants' contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable.... **Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute....** Only those who consent to [ ] agreements with binding arbitration clauses are forced to abandon [a class action]; those who do not consent to arbitration in their contracts have the full selection of forums.... The appellants here knowingly signed an agreement to arbitrate their statutory claims; accordingly, they abandoned their right to enforce those claims as part of a class action.

Horenstein v. Mortgage Market, Inc., 2001 WL 502010 * 1 (9th Cir. May 10, 2001) (emphasis added) (internal quotations and citations omitted); *see also, Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 822 n.1 (8th Cir. 2003) (rejecting plaintiff's argument that arbitration agreement was unenforceable because it did not provide for maintenance of FLSA collective actions in arbitration).

Based on these authorities, an employee's waiver of his/her ability to use the procedural mechanism of maintaining a collective action in arbitration is fully enforceable under the law and **does not** impair his/her substantive rights under the FLSA, ADEA, or any other statute that

provides a procedural mechanism for collective actions in civil litigation. Neither the National Labor Relations Act nor any Board precedent is to the contrary.

Counsel for the General Counsel's position, in effect, that an individual cannot be permitted to agree to arbitrate his/her claims individually but can agree to the forum to resolve the dispute is absurd. If such a position were accepted as correct, it would have the effect of declaring unlawful under the NLRA every employer-employee arbitration agreement that prohibits collective actions in arbitration, thereby "overruling" the Supreme Court's decision in *Gilmer*, and the numerous Circuit Court of Appeals decisions that have found such collective action waivers valid and enforceable. This outcome and the instability in labor relations that would flow from that outcome are contrary to the intent and spirit of the Act.

2. The NLRB General Counsel's Guideline Memorandum explicitly acknowledges individual waivers of collective claims are enforceable.

In Memorandum GC-10-06, issued on June 16, 2010, and published on the Board's website, the Board's General Counsel ("Board's General Counsel") has provided guidelines "Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies" (hereinafter, "Memorandum"). The Memorandum discusses "the validity of mandatory arbitration agreements that prohibit arbitrators from hearing class action employment claims while at the same time requiring employees to waive their right to file any claims in a court of law." (*Id.* at p.1). The Memorandum thus applies to the very type of arbitration agreement that the Company has promulgated and which is the subject of paragraphs 4 and 5 of the Complaint in this case.

In the Memorandum, the Board's General Counsel recognizes that while Supreme Court precedent establishes the right of employees to be free from employer retaliation when acting concertedly to improve their working conditions by resorting to administrative and judicial

forums (*e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978)), the Supreme Court determined in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), that an employer "can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution." (Memorandum at p. 1). The Board's General Counsel stated that "[t]he orderly development of the law under the Act and the sound exercise of prosecutorial discretion by the General Counsel demand that we take account of the long term, well developed body of case law in this area." (*Id.*). These considerations fully apply in the instant case, for the claims that Cuda and other employees sought to assert in a class or collective action against the Company before the AAA were all individual wage claims under the Fair Labor Standards Act and not NLRA claims.

The Memorandum directly addresses the question "whether there is a conflict between the Board law protecting employees who concertedly seek to vindicate their employment rights in court and the court law upholding individual waivers of the right to pursue class action relief." *Id.* "It should not be overlooked," said the General Counsel, "that employers and employees alike may derive significant advantages from arbitrating claims rather than adjudicating them in a court of law." (*Id.* at p. 2).

Contrary to the position of Counsel for the General Counsel in the instant case, the Office of the General Counsel in the Memorandum specifically concludes that there is "**no merit** ... in arguments that, while a *Gilmer* forum waiver alone may not raise Section 7 issues, an employer's demand that employees agree not to institute a class action to further his or her individual claims does implicate Section 7, because filing a class action is inherently concerted activity on behalf of others." (Memorandum at p. 6 (emphasis added)). Rather, holds the Memorandum, "an individual employee's agreement not to utilize class action procedures in pursuit of purely

personal individual claims **does not involve a waiver of any Section 7 right**." (*Id.* (emphasis added)).[6] The Memorandum concludes, "**no Section 7 right is violated when an employee possessed of an individual right to sue enters such a Gilmer agreement as a condition of employment and ... no Section 7 right is violated when that individual agreement is enforced**." (*Id.* (emphasis added)). In short, the argument of Counsel for the General Counsel in the present case directly contradicts the GC Memorandum.

It follows from the Memorandum and legal authorities cited therein that the Company did not violate Section 8(a)(1) of the Act by having employees enter into the Arbitration Agreement as a condition of employment and by arguing to AAA that Cuda and the other employees' request for class or collective action status violated the agreement and was inappropriate. Rather, according to the Memorandum, the Company's actions were fully in accord with the teachings of *Gilmer* and its progeny (discussed at p. 5 of the Memorandum) and the proper application of *Gilmer* principles to NLRA law. (*Id.* at p. 7) ("The Employer ... may lawfully seek to have a class action complaint dismissed ... on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.").

3. There is no merit to the claim that the Company violated Section 8(a)(1) of the Act because the Arbitration Agreement allegedly constitutes a threat of discipline or retaliation against employees for joining together to attempt to have their class and collective action waiver set aside.

Notwithstanding that the class and collective action waiver in the Company's Arbitration Agreement is lawful and enforceable under the Supreme Court's *Gilmer* decision and its progeny

[6]Quite recently, the Supreme Court has even held (1) waiver of a judicial forum in favor of arbitration is something to which a union representing employees under the NLRA can agree with respect to individual employees' non-NLRA rights, and (2) such a waiver is valid and fully enforceable. *14 Penn Plaza LLC v. Pyett*, 556 US__, 129 S. Ct 1456 (2009).

as well as the Board's General Counsel's own analysis in the Memorandum, Counsel for the General Counsel argued at the hearing and in his exceptions to the ALJ's findings that the Arbitration Agreement can somehow be read as precluding employees from "joining together to challenge the prohibition against filing class action[s] or other types of joint claims." (Tr. at p. 17). This argument is wholly unsupported by the facts in this case and, even if deemed consistent with the Memorandum, is based upon contradictory and circular reasoning from the Memorandum that should be disregarded.

As previously described, the Memorandum specifically finds that a class and collective action waiver in an arbitration agreement that an employer requires an employee to sign as a condition of employment is valid and may be enforced by the employer without violating the Act: "Employers ... may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act." (Memorandum at p. 7). The Memorandum also states, however, that employees must be free to act concertedly to challenge these agreements if they so choose "and may not be threatened or disciplined for doing so." *Id.* Accepting for purposes of argument the validity of this proposition -- that is, that the waiver does not violate Section 7 but that employees nonetheless have a Section 7 right to join together to attempt to overturn it -- the Memorandum goes further and requires that the "wording" of the arbitration agreement actually "make clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer." *Id.* Counsel for the General Counsel apparently contends that the wording of the Arbitration Agreement in the present case does not meet this standard.

There is no merit to this position. First, requiring an otherwise valid arbitration agreement containing a class and collective action waiver that is lawful under *Gilmer* and its progeny to include affirmative language to "make clear" to employees their Section 7 right to concertedly challenge that very waiver amounts to more than preserving employees' rights to engage in Section 7 activity without reprisal. Rather, it is very close to affirmative encouragement to employees to take such a course and is effectively at odds with the finding elsewhere in the Memorandum that an individual class and collective action waiver is valid and enforceable and not *per se* unlawful under the Act. At the very least, the potential confusion engendered by the "mixed message" the General Counsel would have the Company convey to employees is manifest. The unfounded burden and expense that this mixed message and resulting litigation could place upon the courts, employees and employers is equally obvious and absurd.

Moreover, the General Counsel's role is to provide guidance reflecting his interpretation of the law as applied to a given set of facts, not to instruct employers how to draft agreements in the future. Consistent with the Memorandum, the Arbitration Agreement does not "threaten or discipline" employees contesting the validity of the class action waiver in the agreement. Requiring affirmative language memorializing the absence of such a threat is beyond the purview of the General Counsel, and utilizing the General Counsel's faulty logic, such a requirement could be extended to every document published by every employer with no end (*e.g.*, every employment application, every internal form, *etc.*).

While the Company does not dispute that employees have the right under the Act to concertedly challenge the waiver without suffering reprisals, no evidence even suggests, much less demonstrates, that employees were or will be subject to discipline or reprisals for mounting

that challenge if they so choose. Nothing in the Arbitration Agreement prohibits Cuda or any other current or former employee from meeting with other employees to discuss their respective cases or claims, sharing information about their respective cases or claims, or engaging in any other activity in furtherance of mutual aid and benefit regarding those cases or claims. Cuda is free to consort, meet, and share documents, facts, and strategies with any and all current and former employees who wish to speak with him, without reprisal. In fact, as the arbitration demands served by Cuda's attorneys show, a number of current and former employees are being represented by the same counsel, and the Company has not discriminated against or penalized them for engaging in any concerted activities. The undisputed facts in the record here show Cuda and other employees chose to challenge the class or collective action waiver without reprisals of any kind from the Company. The Company merely exercised its legal right to protest those actions before the AAA but took no action that can be characterized as retaliatory or otherwise in violation of the Act.

Furthermore, there is nothing in the Arbitration Agreement itself that suggests that the Company could or even might retaliate against employees for challenging the waiver. The language of the agreement regarding matters subject to arbitration is limited to "individual claims." The agreement merely states that the arbitrator is not empowered to grant class or collective relief; there is no language stating or suggesting that employees are prohibited from and/or will be retaliated against for joining together to attempt to bring about a contrary result. This satisfies the requirement of the Memorandum that the right to challenge the waiver is, in the language of the Memorandum (at p. 7), "preserved." Accordingly, the claim by Counsel for the General Counsel that the promulgation, maintenance, and enforcement of the agreement violates

Section 8(a)(1) by denying employees the right to attempt to challenge the agreement upon pain of reprisals is without merit and unsupported by the record.

B. The Board Should Impose No Remedial Obligations on the Employer.

1. The General Counsel's positions are contrary to the express language of the FAA.

As made clear above, the FAA calls for arbitration agreements to be analyzed as ordinary contracts and only as ordinary contracts, rather than parsed and nit-picked according to an administrative agency's own idiosyncratic requirements. The concept of what "employees reasonably could believe" is at odds with the straightforward approach to contract interpretation mandated by the FAA, and it imposes precisely the sort of extra-contractual hurdle to enforcement that Congress decisively rejected in enacting the FAA. The General Counsel seeks to take this case back to the state of the law prior to such enactment. But the General Counsel cites no authority for this clear departure from the expressed will of Congress, and there is none. The "what employees reasonably could believe" standard cannot be applied to arbitration agreements, and must be abandoned as a rule of decision in this case.

The record reflects that the arbitration provisions at issue were signed and duly executed by Respondent's employees. Under the FAA, any defects or irregularities in the signing or execution of these agreements is a matter for straightforward analysis under the contract law principles of the relevant state(s), including, as applicable, legal doctrines related to "adhesion contracts," consideration and various grounds for avoiding contractual obligations. The reach of the FAA cannot be escaped merely by characterizing the agreements as mandatory policies. The fact is that the dispute in this case is over arbitration agreements, not policies.

Recently, the Supreme Court addressed whether a party to a clearly drafted arbitration policy may be forced to act in any way contrary to the express terms of the agreement. In *Stolt-*

Nielsen S.A. v. Animalfeeds International Corp., 599 U.S. __ (2010), the Court held that it is improper and inconsistent with the FAA for a court to impose class arbitration on parties to a clearly drafted arbitration agreement when no language in the agreement would provide for such. *Id.* at 20, 23. The Court found parties to an express arbitration agreement cannot be compelled to do something under the agreement that clearly is outside the actual terms of the agreement. *Id.* To do so would be amount to a forced modification of an agreement between parties which is contrary to the FAA.

The General Counsel cites *U-Haul of California*, 347 N.L.R.B. 375 (2006), in support of his contention that the Arbitration Agreement violates Sections 8(a)(1) and 8(a)(4). Apart from other distinguishing factors noted above, neither Board decision even attempted to reconcile the "what employees reasonably could believe" standard with the FAA. Notably, the General Counsel does not cite any Supreme Court authority for the proposition that the Board may interfere with thousands of individual contracts based on a rule that flatly contradicts congressional intent as set forth in the text of a federal statute. *U-Haul of California* offers no basis for ignoring the FAA.

For the reasons explained above, the Board simply does not have the authority to order the Company to modify and rescind an arbitration agreement as is sought by the General Counsel. The only grounds for rescinding or modifying an arbitration agreement are those applicable to contracts generally, according to the state law principles of the applicable jurisdiction. 9 U.S.C. § 2; *Gilmer*.

2. The Board should neither impose nor extend remedial obligations on the Company.

The Company does not agree that any violation of the Act exists or has existed in this matter as was outlined in the Company's March 14, 2011 exceptions and supporting brief to

portions of the ALJ's decision. Therefore, the Company asserts that no remedy imposing obligations on the Company would be proper for any aspect of the ALJ's decision.

Furthermore, even if the Board finds that a violation of the Act has occurred and that some remedy should be imposed (which the Company strongly asserts to the contrary) the Board should not extend any remedies recommended by the ALJ as requested by the General Counsel. The Board has long held that, when the record is insufficient to establish that alleged improper conduct extended beyond the geographic area of the location examined in the unfair labor practice proceeding, the imposition of a remedy should be limited only to that geographic area examined in the record. *See Read's Inc.*, 228 N.L.R.B. 1402, 1402 (1977) (where "record [was] devoid of any evidence that the unfair labor practices found herein had an impact on employee organizational activities outside the [geographic location of the facilities examined in the record]" the Board limited the remedy only to the location of the facilities examined); *See also Beverly Health & Rehabilitation Services*, 339 N.L.R.B. 1243, 1243-44 (2003) (Board found "corporatewide remedy [was] not warranted" where record was insufficient to indicate that alleged unlawful activity extended beyond the geographic area which served as the basis for the decision); *John J. Hudson, Inc.*, 275 N.L.R.B. 874, fn. 2 (1985) ("[t]he Board requires notice postings on a companywide basis **only** where there is a clear pattern or practice of unlawful conduct") (emphasis added).

Here, the record is insufficient to establish that the Arbitration Agreement was implemented outside the geographic area examined on the record and there is certainly not clear evidence to indicate otherwise. Although a company employee testified that the Arbitration Agreement was introduced companywide, all testimony on the record was entirely limited to the implementation of the Arbitration Agreement in the Jacksonville, Florida division of the

Company. (Tr. at pp. 33-36). There is no record evidence that would establish how the Arbitration Agreement was implemented at other Company locations, whether there were any locations excluded, what employee training or other explanations of the agreement may have been used at other locations, or even if the Arbitration Agreement that was the subject of the instant matter was similar to others used in other parts of the country. There is not enough evidence on the record to support the imposition of a company-wide remedy in this matter and the Board should decline the General Counsel's request to extend the remedy.

CONCLUSION

For all of the foregoing reasons, the decision and recommended Order of the Administrative Law Judge should be upheld by the Board on those points excepted to by the General Counsel, and the complaint against D.R. Horton, Inc. should be dismissed.

Respectfully submitted,

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Dated: April 11, 2011

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and	)	**Case 12-CA-25764**
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CERTIFICATE OF SERVICE

I certify that the foregoing document was served by electronic mail on:

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Bernard P. Jeweler

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